**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **LILA M. OSBURN**<br>Claimant | ) | |
| VS. | ) | Docket No. **1,058,856** |
| **STORMONT-VAIL HEALTHCARE, INC.**<br>Self-Insured Respondent | ) | |

## ORDER

The self-insured respondent requests review of the July 26, 2013, Award by Administrative Law Judge (ALJ) Rebecca Sanders. The Board heard oral argument on November 13, 2013.

### APPEARANCES

George Pearson of Topeka, Kansas, appeared for claimant. Anton Andersen of Kansas City, Kansas, appeared for respondent.

### RECORD AND STIPULATIONS

The Board has considered the entire record and adopts the stipulations listed in the Award.

### ISSUES

The ALJ found claimant sustained personal injury by repetitive trauma arising out of and in the course of claimant's employment with a date of injury of December 14, 2011. The ALJ further found claimant sustained a 9% permanent impairment of function to the whole body and awarded permanent partial disability (PPD) based on a 33.7% work disability, followed by a 35.15% work disability beginning July 1, 2012.

Respondent claims the ALJ erred in determining: (1) whether claimant sustained personal injury by accident arising out of and in the course of her employment; (2) the nature and extent of claimant's disability, including whether claimant has a scheduled injury to the right upper extremity or a general bodily disability; and, (3) whether claimant is entitled to future medical treatment pursuant to K.S.A. 2011 Supp. 44-510h.

Claimant argues that as a result of her repetitive keyboarding, she is unable to engage in any substantial and gainful employment and is accordingly entitled to an award based on permanent total disability.

The issues before the Board are:

1. Did claimant sustain personal injury by repetitive trauma arising out of and in the course of her employment, including that such alleged repetitive trauma was the prevailing factor in causing her injury, medical condition and resulting disability?

2. What is the nature and extent of claimant's disability?

3. Is claimant entitled to future medical treatment?

## FINDINGS OF FACT

Having reviewed the evidentiary record, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings:

Lila Osburn was age 59 when she testified at the February 28, 2012, preliminary hearing.[1] On July 5, 1989, she was hired by respondent on a full-time basis as a medical transcriptionist,[2] a position requiring sitting at a computer and typing medical information. Claimant, who is right hand dominant, occasionally answered the phone, but performed keyboarding about 80% of the time. She worked 40 hours a week until approximately 2007, when she began working three 8-hour days a week (Monday, Thursday and Friday). At times, claimant worked more than 24 hours a week because she filled in for co-workers on vacation, but worked less than 24 hours a week other times.

Claimant's work as a transcriptionist required constant, repetitive hand movements, repetitive use of her thumbs to strike the space bar, finger flexion and wrist pronation. She testified that in approximately October 2011, she developed shooting pain into her wrists, palms and thumbs. Her fingers were constantly swollen and felt tight and tingly. Her hands felt better on weekends. While claimant had a history of bilateral carpal tunnel releases, multiple EMGs and had used wrist splints, she believed the symptoms she developed in October 2011 were brought about by "transcribing for almost 23 years."[3]

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[1] The parties agreed the preliminary hearing transcript is part of the evidentiary record. Such agreement did not include the hearing exhibits and the Board accordingly has not considered those exhibits.

[2] Claimant actually performed the job of a supervisor of receptionists for a short period, then commenced the transcriptionist position. (R.H. Trans. at 12).

[3] *Id*. at 22; see also pp. 38, 48-49.

There is some evidence that claimant's upper extremity complaints developed before October 2011, perhaps as early as December 2010. Claimant sent an April 25, 2011 email to Shelby Patch, respondent's liaison for workers compensation injuries. The email subject line stated, "Work comp trouble with hands."[4] Claimant reported physical symptoms and asked what she needed to do to be evaluated.[5]

At some point during claimant's period of part-time work, respondent initiated an incentive pay program under which monetary bonuses were paid to employees who increased their production. Claimant participated in the incentive program and worked faster as a consequence. She testified:

> Q. Was there anything built into the work situation in the last couple of years that dealt with an incentive to work at a --
>
> A. I --
>
> Q. Hold it. -- to work at a particular speed?
>
> A. The faster we typed, the more money we made. They had what they called incentive. And if we went over a certain amount of lines for the day, they had incentives. So we tried to type harder and harder to make more money.
>
> Q. So the more lines on a page that you typed you could get more money?
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> A. Correct.[6]

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[4] Claimant Depo., Ex. 1.

[5] Under K.S.A. 2010 Supp. 44-508(d), claimant's date of accident could be April 25, 2011. However, neither party raised as an issue the date of injury by repetitive trauma under K.S.A. 2011 Supp. 44-508(e) or date of accident under the law as it existed before May 15, 2011. Even though the parties did not raise such issue, the Board could address the issue. See *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, 516, 949 P.2d 1149, 1153 (1997). "K.S.A. 44-551(b)(1) [predecessor to K.S.A. Supp. 44-44-551(i)(1)] does not limit the Board's authority to issues raised in the written request for review." Once an award is appealed, the Board has "full jurisdiction to review the award and correct any errors it found therein." *Helms v. Tollie Freightways, Inc.*, 20 Kan. App. 2d 548, Syl. ¶ 2, 889 P.2d 1151 (1995).

Despite the authority to do so, the Board will not address date of injury by repetitive trauma or date of accident. The Board has frequently declined to review an issue not raised by the parties and often limits review to "questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge." See K.S.A. 2011 Supp. 44-555c(a). Moreover, the Kansas Court of Appeals has recently voiced displeasure with the Board for "unilaterally" having "reached out to grab" an issue "without a request . . . or notice to the parties." *Goss v. Century Manufacturing, Inc.*, No. 108,367, 2013 WL 3867840 (Kansas Court of Appeals unpublished decision filed July 26, 2013).

[6] R.H. Trans. at 14.

On Monday, December 12, 2011, claimant again contacted Shelby Patch, respondent's liaison for work injuries, seeking approval for medical treatment. Respondent directed claimant to Dr. Dale Garrett, whose nurse practitioner, David Couch, evaluated claimant on December 14, 2011. Mr. Couch recommended modified duty restricting claimant from typing and writing. On December 20, 2011, claimant was examined by Dr. Garrett, who imposed additional restrictions of no repetitive or prolonged pinching or gripping. Physical therapy was prescribed, but was largely ineffective.

On December 15, 2011, claimant filed an application for hearing with the Kansas Division of Workers Compensation alleging a series of repetitive trauma with a date of accident of December 14, 2011. At the regular hearing, claimant changed the alleged date of repetitive trauma to either December 14, 2011 or, alternatively, December 20, 2011.[7]

Respondent placed claimant in an accommodated position making copies and highlighting discharge summaries. Claimant testified:

> Q. Did you have problems doing that?
>
> A. Both of those were painful.
>
> Q. Was it more painful than you could tolerate?
>
> A. Yes.
>
> Q. Did you bring that to someone's attention?
>
> A. Yes.
>
> Q. Who?
>
> A. Jill Straub, who is the Director of H-I-M [health information and management].
>
> Q. So what was decided to do?
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> A. I was told to go home. And she would contact me if they could find something for me to do.[8]

[7] *Id.* at 4-5.

[8] *Id.* at 28.

The last day claimant worked for respondent was approximately December 20, 2011.[9] Claimant has not engaged in gainful employment since she last worked for respondent and she does not believe she is employable. Claimant described her current symptoms as follows:

> The tightness that I feel is in both my hands, including my fingers. It doesn't radiate. It's in my hands and fingers. It feels tight, and somewhat like a different sensation. I can't really describe it as numbness. But it is a tingly sensation. The pain I have is in the palm of my hands. When I try to grip, like to write or type, any movement with my thumb, trying to grip or do anything with my hands, the pain is here [the base of the thumb], it radiates up, half way up my arm.[10]

Dr. Lynn Ketchum, board certified in plastic and hand surgery, evaluated claimant on February 9, 2012, at the request of her counsel. The doctor reviewed claimant's medical records, took a history and performed a physical examination. Dr. Ketchum noted claimant "has pain in her wrists, particularly over the radial side of the right wrist with pain in the CMC joint of the right wrist and she has 3+ positive Finkelstein there for deQuervain's syndrome."[11] He further observed claimant had recently developed "pain in her hands to the point where she cannot open medicine bottles" and she could not repetitively type because of her "persistent hand pain."[12] Claimant was diagnosed with deQuervain's syndrome of the right wrist and stenosing tenosynovitis of the right second digit and of the third and fourth digits of the left hand. DeQuervain's is stenosing tenosynovitis of the first extensor compartment on the back or dorsum of the wrist. Two tendons traverse the first extensor compartment on their way to the thumb. Stenosing tenosynovitis can also develop in the distal palm, which produces "pain and sometimes intermittent locking, crepitus, which is a sensation of snapping."[13]

Dr. Brian Divelbiss, a board certified orthopedic surgeon, was appointed by the ALJ to perform an independent medical evaluation. The doctor was asked to: (1) examine claimant; (2) review medical records; (3) make a diagnosis; (4) provide treatment recommendations; (5) identify appropriate work restrictions; (6) determine causation; and (7) express an opinion on the prevailing factor for claimant's current complaints.

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[9] The record is unclear precisely when claimant last worked for respondent: December 14, 2011, December 20, 2011, or during the week of December 20, 2011.

[10] R.H. Trans. at 20.

[11] Ketchum Depo., Ex. 2 at 1.

[12] *Id.*

[13] *Id*. at 9-10.

Dr. Divelbiss reviewed medical records, took a history and performed a physical examination on May 2, 2012. Claimant complained of bilateral radial-sided wrist pain that at times radiated into her forearms. Dr. Divelbiss diagnosed bilateral deQuervain's syndrome based largely on his findings of tenderness of the radial side of claimant's wrist joints, associated with some swelling and bilateral positive Finkelstein tests.[14]

Dr. P. Brent Koprivica, board certified in emergency, preventive and occupational medicine, evaluated claimant on June 28, 2012, at the request of claimant's counsel. The doctor reviewed claimant's medical records, took a history and performed a physical examination. Dr. Koprivica diagnosed bilateral deQuervain's syndrome. Based upon the AMA *Guides*,[15] Dr. Koprivica rated claimant's functional impairment using two methods:

(1) Due to pinch strength deficit, claimant's right upper extremity sustained a 20% impairment which converted to a 12% whole body impairment. Again, based on pinch strength deficit, claimant's impairment was rated at 10% to the left upper extremity, which converts to 6% to the whole body. Utilizing the AMA *Guides*' Combined Values Chart, combining the ratings of 12% to the body and 6% to the body results in an aggregate whole body functional impairment of 17% to the body as a whole.

(2) Dr. Koprivica also rated claimant's impairment based on Table 39 of the AMA *Guides*, which concerns impairment for constrictive tenosynovitis. Dr. Koprivica found severe tenosynovitis on the right, for which he rated 60% to the right thumb. He found mild tenosynovitis on the left, for which he rated 20% to the left thumb. Dr. Koprivica extrapolated these ratings to 13% to the body for the right thumb and a 4% to the body for the left thumb. Using the AMA *Guides*' Combined Values chart, the two whole body ratings combine for a 16% to the whole body.[16]

On October 16, 2012, claimant returned to see Dr. Ketchum for his opinions regarding impairment, work restrictions and prevailing factor. Claimant stated her hands were worsening and that she had pain and crepitus in the left palm in line with the left third and fourth digits. Dr. Ketchum noted claimant had a very positive right Finkelstein test for deQuervain's syndrome.

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[14] The Finkelstein test is a physical examination technique in which the thumb is flexed into the palm and a fist is made over the thumb, thus stretching the tendons that run through the first extensor compartment to see if the stretching causes pain. (Divelbiss Depo. at 10).

[15] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[16] Dr. Koprivica's ratings are explained in detail in Exhibit 3 to his deposition, which includes those portions of the AMA *Guides* the doctor relied on to arrive at his opinions regarding functional impairment.

In a November 5, 2012 letter, Dr. Ketchum rated claimant's right deQuervain's syndrome and stenosing tenosynovitis of the right second digit at 10% to the right forearm, as based on the AMA *Guides*. Dr. Ketchum rated claimant's left hand at 5% for the stenosing tenosynovitis of the left third and fourth digits. Dr. Ketchum did not provide individual ratings to the left third and fourth digits. Dr. Ketchum imposed permanent restrictions against repetitive work.

Drs. Ketchum, Divelbiss and Koprivica all testified. Dr. Ketchum testified claimant's previous bilateral carpal tunnel syndrome was a completely separate and distinct condition from her right deQuervain's syndrome and stenosing tenosynovitis of her fingers. In Dr. Ketchum's opinion, claimant's repetitive keyboarding caused her right deQuervain's syndrome and stenosing tenosynovitis and was the prevailing factor in causing claimant's current medical condition and resulting impairment.[17] Dr. Ketchum testified claimant's repetitive work over many years resulted in her upper extremity symptoms:

> A. Well, I have to go by my previous statement, that the highly repetitive work that she did in the -- somewhere around twenty years or less could have certainly predisposed her to develop the symptoms that she developed around 2011.[18]
>
> . . .
>
> You know, I -- the best I can say is that I would stand by the -- my testimony that I made just a minute ago, that her previous work predisposed her to that, and this simply was the straw that broke the camel's back after a period of time.[19]

Dr. Ketchum further testified that claimant's part-time work during the last few weeks of claimant's employment would not, "in and of itself,"[20] be the prevailing factor in developing the symptoms she experienced in 2011. He also testified:

> Q. Now -- and I think I understood you, Doctor, to say that you didn't believe that that level of work over that period of time [the period of claimant's part-time transcriptionist work] should manifest itself into the DeQuervain's Syndrome; is that true?
>
> A. Correct.
>
> Q. Or shouldn't have caused the tenosynovitis, correct?

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[17] Ketchum Depo. at 22-23.

[18] *Id.* at 16-17.

[19] *Id.* at 18.

[20] *Id.* at 41.

A. Correct.

Q. So based upon that testimony, you don't believe that the work that she was doing at Stormont-Vail in 2011 was the prevailing factor in her DeQuervain's Syndrome on the right side, correct?

A. Correct.

Q. And it's not the cause of her problems with her tenosynovitis in 2011, correct?

A. Correct.

Q. And it's not -- and we've already talked about -- that's on the right side. We've already talked about the left side. You would agree that the prevailing factor on the left side of tenosynovitis is not her work activities at Stormont-Vail in 2011, correct?

A. Correct.[21]

However, Dr. Ketchum still opined claimant's deQuervain's syndrome and stenosing tenosynovitis were caused by her work for respondent as a medical transcriptionist.[22]

Dr. Ketchum reviewed the list of claimant's former work tasks prepared by claimant's hired vocational consultant, Bud Langston, and concluded claimant had a 50% task loss based on her no longer being able to perform 1 of the 2 nonduplicative tasks claimant performed in the five years before her injury. In contrast, in Mr. Langston's vocational opinion, claimant was permanently and totally disabled from engaging in any substantial, gainful employment, based upon her age, education, training, work history and residual functional capacity.

Dr. Divelbiss testified:

Q. Doctor, did you believe her job duties, activities of a keyboardist, was the prevailing factor in the development of her DeQuervain's?

A. No.

Q. Why not?

A. The use of the thumb on the keyboard I don't believe is not particularly forceful and honestly not particularly repetitious. I mean, it's the finger you're using for the spacebar and that's not a position where there is a loft of stress on those particular

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[21] *Id.* at 36-37.

[22] *Id*. at 40.

> tendons. It's basically that thumb is going down to hit the space tab, spacebar, and a lot of that time it's a combination of actually wrist motion and a little bit of thumb motion, so I don't generally consider DeQuervain's and keyboarding really to be associated.[23]

Dr. Divelbiss opined that even though claimant had deQuervain's tenosynovitis she could continue working full time as a transcriptionist because she was not going to do any damage to herself. Dr. Divelbiss reviewed the list of claimant's former work tasks prepared by vocational consultant Steve Benjamin and concluded claimant could perform all 4 of the tasks for a 0% task loss.

Dr. Divelbiss further testified:

> Q. When you use the spacebar as you're typing, you're using thumbs, are you not?
>
> A. Yes. You use your thumb and a little bit of wrist motion, but not -- you know, to have a chronic overuse condition, that requires both highly repetitious activity as well as an activity that is forceful, so just because you do something frequently doesn't mean that it's associated with an overuse syndrome. There has to be a level of stress or force on that tendon to produce that inflammation.[24]
>
> . . .
>
> Q. For 22 years hitting a spacebar with your thumbs is not sufficiently forceful in your opinion to be a prevailing factor for DeQuervain's syndrome?
>
> A. No, because the orientation of what you're doing when you hit that spacebar, really there is minimal motion on those tendons. You're not flexing and extending. The thumb, you're just abducting it, and the motion is what I would describe as small and not particularly forceful, but I don't have a number to describe the force.
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> Q. You're saying there is minimal flexion of the thumbs in keyboard operation?
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> A. Yes.[25]

Dr. Divelbiss did not rate claimant's permanent impairment of function.

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[23] Divelbiss Depo. at 17-18.

[24] *Id*. at 25-26.

[25] *Id*. at 30.

Dr. Koprivica defined deQuervain's as "a type of constrictive tenosynovitis that is specifically to the thumb. . . ."[26] Dr. Koprivica did not find stenosing tenosynovitis, which he referred to as "trigger fingers."[27] Dr. Koprivica concluded the stenosing tenosynovitis resolved before his examination.

In discussing causation of claimant's deQuervain's syndrome, Dr. Koprivica testified:

> A. Well, if you look at the problem that she is developing -- and this may be an analogy -- but it's a repetitive cumulative affect [sic] of doing repetitive movements of the thumb where you're pushing the space the space keys with your thumbs primarily when you're doing typing. And the analogy is that the structure is able to do that task one time without any significant injury, but as you do it over and over, it causes a wear and tear, a progressive injury to the tendon structure.[28]
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> . . .
>
> A. Clinically, I don't know how you say when it started. It's an ongoing cumulative process. And really to date where it's diagnosable is October of 2011, but that process was ongoing that contributes to this throughout those 22 years.[29]
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> . . .
>
> Q. If the etiology is unknown, what is the relationship between the DeQuervain's syndrome, if you could put it in a nut shell, and the repetitive work that this lady did the last five years as Stormont-Vail's medical transcriptionist?
>
> A. If you look at what is known, there are certain conditions that are associated with the development of DeQuervain's. One of them being rheumatologic conditions and auto immune inflammatory problems that affect tendons. There is an association of developing DeQuervain's syndrome, which in this case she doesn't have.
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> So when we look at cause and what is the prevailing factor as to what has caused her to develop this condition, that is not identified. Genetics can always be a consideration, the way connective tissues are made on a genetic basis, some people are more prone to developing injury than other people genetically. It's part of the gene pool, that some people live longer, some people have certain problems more than others, and that is inherited. But that is always a consideration. There

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[26] Koprivica Depo. at 8.

[27] *Id*.

[28] *Id.* at 11.

[29] *Id.* at 13.

> is no clear cut imperative DeQuervain's syndrome that has been established in the literature. But that is a factor to consider.
>
> Females are more common to get it in their middle ages, so she fits in that role. So those are considered. But the thing that I thought in terms of cause is repetitive over-use has been associated with developing tendonitis. And this is a type of tendonitis. And that tendonitis progresses as you use it more and more.
>
> And if you look at the factors that I'm looking at, and as I understand prevailing factors, of all factors that we're looking at, what is the predominant reason why the person has developed the impairment and needs treatment, is the fact that she is over-using the tendons that have developed the DeQuervain's tenosynovitis.
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> . . .
>
> The general population is not exposed to that same risk. When I look at that, the more she types, the worse it gets. And when I looked at all of those factors that are contributors, the over-use problem that she has on a cumulative basis, I felt was the predominant reason why she is symptomatic, why she has disability or impairment disability, why she needs treatment, in terms of all of the other factors I would look at.[30]

Dr. Koprivica further testified:

> Q. Ms. Osburn had surgery for bilateral carpal tunnel syndrome in the mid 2000's, 2005 by Doctor Baraban. Does that prior history of carpal tunnel syndrome contribute to the DeQuervain's syndrome?
>
> A. No, it's a distinctly different impairment. Now, the nature of her activities in terms of hand use is also causally associated with the carpal tunnel syndrome, but that is a distinct condition.[31]

The doctor restricted claimant from repetitive hand use, repetitive use of the thumb and pinching. Dr. Koprivica reviewed the list of claimant's former work tasks prepared by Mr. Langston and concluded claimant could no longer perform 1 of the 2 tasks for a 50% task loss.

Other than Mr. Langston, one other vocational expert was involved in the case. Steve Benjamin interviewed claimant on April 12, 2013, at the request of respondent's attorney. He prepared a task list of 4 nonduplicative tasks claimant performed in the 5-year period before her injury. Mr. Benjamin opined that claimant was capable of earning an

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[30] *Id.* at 15-17.

[31] *Id*. at 27-28.

average of $465.93 based upon a 40 hour week. When comparing her average weekly wage at the time of her injury,[32] claimant would have a 17.4% wage loss.

## PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2011 Supp. 44-501b states in part:

> (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
>
> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

An injury arises out of employment if it arises out of the nature, conditions, obligations, and incidents of the employment.[33] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[34]

K.S.A. 2011 Supp. 44-508 provides in relevant part:

> (e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.
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> . . .
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> (f) (1) "Personal injury" and "injury"mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injuries may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

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[32] Claimant's average weekly wage was $563.75 without fringe benefits, and $584.93 with fringe benefits as of July 1, 2012.

[33] *Brobst v. Brighton Place North*, 24 Kan. App. 2d 766, 771, 955 P.2d 1315 (1997).

[34] *Springston v. IML Freight, Inc.*, 10 Kan. App. 2d 501, 704 P.2d 394, *rev. denied* 238 Kan. 878 (1985).

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

. . .

(3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2011 Supp. 44-510h(e) provides in relevant part:

It is presumed that the employer's obligation to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee . . . shall terminate upon the employee reaching maximum medical improvement. Such presumption may be overcome with medical evidence that it is more probably true than not that additional medical treatment will be necessary after such time as the employee reaches maximum medical improvement. The term "medical treatment" as used in this subsection (e) means only that treatment provided or prescribed by a licensed health care provider and shall not include home exercise programs or over-the-counter medications.

The Board finds the preponderance of the credible evidence supports the ALJ's findings that claimant sustained personal injury by repetitive trauma arising out of and in the course of her employment, with a date of injury of December 14, 2011, and that the prevailing factor causing claimant's injury, current medical condition and her disability or impairment is the repetitive trauma.

Dr. Ketchum opined "that the repetitive work that [claimant] did with increased output over 22 years at Stormont Vail was the prevailing factor in causing her stenosing tenosynovitis and her de Quervain's syndrome."[35] Claimant believed her symptoms were brought about by almost 23 years of transcribing. Claimant's history of repetitive keyboarding is consistent throughout the record.

The opinions of Dr. Koprivica support the finding that claimant sustained personal injury by repetitive trauma arising out of and in the course of her employment. Dr. Koprivica's opined claimant's "overuse associated with her typing is the reason she has impairment and is the prevailing factor in the current need for care and treatment and resultant impairment. There is repetitive injury associated with the overuse from her typing activities. . . ."[36]

The testimony of Dr. Divelbiss casts doubt on a causal relationship between claimant's work and her deQuervain's syndrome. However, the Board has considered Dr. Divelbiss' causation opinions and finds them lacking in credibility because they are inconsistent with claimant's testimony and the opinions of both Drs. Ketchum and Koprivica. The Board also notes, notwithstanding her change from full-time to part-time work, claimant participated in respondent's incentive program with its effects on the repetitive requirements of claimant's job.

The Board also agrees with the ALJ's findings regarding the nature and extent of claimant's disability.

The testimony of claimant, which is relevant to the issue of her physical condition,[37] and the testimony of Dr. Ketchum, support the conclusion that claimant sustained a general bodily disability as a consequence of her injury by repetitive trauma. All three testifying physicians agreed claimant has right deQuervain's syndrome. That malady originates in the forearm and affects the two tendons which travel through the first extensor compartment on their way to the thumb. Claimant's current symptoms are in the right forearm and her hands and fingers. Claimant's complaints regarding the location of her symptoms are consistent throughout the record. Dr. Ketchum testified his ratings were

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[35] Ketchum Depo., Ex. 2 at 2.

[36] Koprivica Depo., Ex. 2 at 15.

[37] See *Graff v. Trans World Airlines*, 267 Kan. 854, 983 P.2d 258 (1999).

based on the AMA *Guides* and his testimony was not called into question through cross-examination or other evidence.

The Board finds Dr. Ketchum's ratings persuasive. Claimant's right deQuervains syndrome and right tenosynovitis in one finger of the right hand result in a 10% impairment to the right forearm. Dr. Ketchum's 5% hand impairment is also adopted. Claimant's symptoms and physical findings are not limited to her left third and fourth digits, but also involve the left hand. Dr. Ketchum noted claimant's complaints include her hands, including pain and crepitus in the left palm.

Claimant's impairment of function to the right forearm and left hand brings this claim within K.S.A. 2011 Supp. 44-510e(a)(2)(A):

> Compensation for permanent partial general disability shall also be paid as provided in this section where an injury results in:
>
> (i) The loss of or loss of use of a shoulder, arm, forearm or hand of one upper extremity, combined with the loss of or loss of use of a shoulder, arm, forearm or hand of the other upper extremity;

Accordingly, claimant sustained a general bodily disability. The Board agrees with and adopts the ALJ's findings regarding claimant's functional impairment, work disability and permanent total disability. It would serve no purpose to duplicate those findings here. Such findings are incorporated into this Order as though fully set forth.

The ALJ committed no error in leaving open claimant's right to seek future medical treatment subject to proper application. All three testifying physicians recommended additional medical treatment,[38] which, according to the record before the Board, has not been provided. The presumption that respondent's obligation to provide medical treatment was terminated when claimant reached MMI was rebutted by medical evidence.

## CONCLUSIONS OF LAW

The Board finds:

1. Claimant satisfied her burden to prove she sustained personal injury by repetitive trauma arising out of and in the course of her employment with respondent. The date of injury by repetitive trauma is December 14, 2011, a finding made by the ALJ, but not appealed.

[38] Ketchum Depo., Ex. 2 at 2; Divelbiss Depo., Ex. 2 at 2; Koprivica Depo., Ex. 2 at 15.

2. Claimant proved her repetitive trauma was the prevailing factor in causing her injuries, current medical condition and resulting disability and impairment.

3. As a consequence of her injury by repetitive trauma, claimant sustained a 9% permanent impairment to the body as a whole, and is awarded PPD compensation based on a work disability of 33.7%, followed by a work disability of 35.15% commencing July 1, 2012.

4. Claimant is not permanently totally disabled.

5. Claimant's right to seek future medical treatment shall remain open upon proper application.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[39] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

## AWARD

**WHEREFORE**, it is the Board's decision that the Award of ALJ Rebecca Sanders dated July 26, 2013, is affirmed in all respects.

**IT IS SO ORDERED.**

Dated this _____ day of April, 2014.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

[39] K.S.A. 2011 Supp. 44-555c(k).

## DISSENTING OPINION

The undersigned respectfully disagrees with the opinion of the majority on the issue of the nature and extent of claimant's disability. The preponderance of the credible evidence establishes claimant sustained scheduled injuries as a result of her repetitive trauma, not a general bodily disability.

The Act recognizes two different classes of injuries which do not result in death or total disability. An injured employee may suffer a permanent disability to a scheduled body part or a permanent general bodily disability.[40] It is the situs of the disability, not the situs of the trauma, that determines which benefits are available.[41] "Functional impairment" is defined in K.S.A. 2011 Supp. 44-508(u) as follows:

> "Functional impairment" means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American medical association guides to the evaluation of impairment, if the impairment is contained therein.

The testimony of only two physicians addressed the extent of claimant's permanent impairment of function: Dr. Ketchum and Dr. Koprivica. Although Dr. Divelbiss testified, he provided no opinions regarding permanent functional impairment. The testimony of both rating physicians supports the conclusion that claimant's impairment does not fall within K.S.A. 2011 Supp. 44-510e(a)(2)(A)(i) because:

1. Dr. Ketchum found claimant sustained deQuervain's syndrome only in the right upper extremity, not the left. He accordingly rated claimant's impairment at 10% to the right forearm, which included impairment for tenosynovitis of one finger on claimant's right hand.[42] Dr. Ketchum also rated claimant's left hand at 5%, but there is no evidence that claimant sustained any permanent loss of physiological function to the left hand, only to the left third and fourth fingers of the left hand. Even though Dr. Ketchum rated claimant's left upper extremity at the level of the hand, such rating is arguably only based on "stenosing tenosynovitis of the left third and fourth digits"[43] and not on loss of function to

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[40] K.S.A. 44-510d; K.S.A 44-510e.

[41] *Bryant v. Excel Corp*., 239 Kan. 688, 722 P.2d 579 (1986).

[42] Dr. Ketchum did not specify what part of his 10% right forearm rating related to claimant's right second digit.

[43] Ketchum Depo. at 26-27: see also *Id*., Ex. 4.

the hand itself. Impairment to two fingers does not mean claimant's injury is to the hand.[44] Dr. Ketchum did not provide ratings for claimant's left third and fourth fingers and his left hand rating was not based on any evident functional impairment to the left hand itself beyond any loss of hand function due to the impairment of the left third and fourth fingers.

2. Neither Dr. Koprivica nor Dr. Divelbiss found stenosing tenosynovitis to any digits on either of claimant's hands. Dr. Koprivica concluded claimant's stenosing tenosynovitis resolved before his examination. Dr. Koprivica did diagnose bilateral deQuervain's syndrome, which he rated at 60% to the right thumb and 20% to the left thumb. Dr. Koprivica's ratings were not to the hand or forearm. The doctor extrapolated his thumb ratings to the upper extremities and to the body as a whole, but by doing so, Dr. Koprivica did not alter his opinion that claimant's loss of physical function was limited to the thumbs. Bilateral thumb injuries entitle a claimant to compensation for separate scheduled injuries to each thumb.[45]

Thus, according to Dr. Ketchum's testimony, claimant sustained a 10% permanent impairment of function to the right forearm, which includes impairment for one finger on the right hand, and impairment on the left limited to the third and fourth fingers. According to Dr. Koprivica's testimony, claimant sustained a 60% permanent impairment of function to the right thumb and a 20% impairment of function to the left thumb. Therefore, under the ratings of either physician, claimant's impairment of function does not fall within K.S.A. 2011 Supp. 44-510e(a)(2)(A)(i) and claimant's injuries may not be compensated for permanent partial general disability. Claimant's injuries are accordingly covered by the schedule as set forth in K.S.A. 44-510d. Under 44-510d, whenever an employee is entitled to compensation for a specific scheduled injury, the same shall be exclusive of all other compensation other than medical compensation.[46]

Under the circumstances presented in this claim, the undersigned Board Member would find the testimony of Dr. Koprivica most persuasive because he provides ratings squarely based on the situs of claimant's disability, both of claimant's thumbs, rather than the situs of the trauma. The rating opinions of Dr. Ketchum are deficient inasmuch as he did not indicate the extent of claimant's impairment relating to the three digits in which he found stenosing tenosynovitis – the right second digit and the left third and fourth digits. The impairment analysis used by Dr. Koprivica clearly specifies those portions of the AMA *Guides* he utilized, whereas Dr. Ketchum's analysis does not. This Board Member, as a result, would modify the ALJ's decision to award permanent partial disability benefits of 60% to the right thumb and 20% to the left thumb. Such findings would render moot the issues of work disability and permanent total disability.

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[44] See *Gallivan v. Swift & Co.*, 136 Kan. 234, 14 P.2d 665 (1932).

[45] *Wammack v. Root Manufacturing Co.*, 184 Kan. 367, 336 P.2d 441 (1959).

[46] K.S.A. 2011 Supp. 44-510d(c).

The undersigned agrees with the majority's findings regarding arising out of, prevailing factor and future medical.

_____
BOARD MEMBER

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Honorable Rebecca Sanders, ALJ